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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 204

MID-FLORIDA TELEVISION CORP., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND WORZ, INC., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Mid-Florida Television Corp. (hereinafter referred to as "Mid-Florida") hereby petitions for a Writ of Certiorari to review a final judgment of the Court of Appeals for the District of Columbia Circuit which remanded a final decision of the Federal Communications Commission in a comparative television proceeding and directed the Commission to receive new applications for the facility.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1965. The jurisdiction of this Court is invoked under the authority of 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented by this petition is:

Whether the Court of Appeals properly exercised its judicial authority to review decisions of the Federal Communications Commission when the court, in reviewing a decision of the Commission in which it otherwise found no error, decided *sua sponte* that the age of the administrative record and the Court's "nagging uncertainty" as to the applicants required new applications for a television station on Channel 9 at Orlando, Florida to be entertained by the Commission although—

(1) that agency had, in accordance with the Court's previous direction, expressly considered whether to receive new applications;

(2) the Commission's decision refusing to entertain new applications was not raised before the court by any party; and

(3) the Commission updated the record and compared and evaluated the applicants in light of their current qualifications.

STATUTES INVOLVED

The pertinent portions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, are set forth in Appendix B, *infra*.

STATEMENT

In 1957, after a full comparative hearing, the Federal Communications Commission granted the application of Mid-Florida for a new television station on Channel 9 in Orlando, Florida, and denied the competing application of respondent WORZ, Inc.[1] Upon appeal by WORZ, Inc., the Court of Appeals affirmed, *per curiam*.[2]

WORZ then filed a Petition for Writ of Certiorari and the United States and the Commission filed a Brief in Opposition urging that the Writ be denied on the merits. The Brief, however, pointed out that during Congressional hearings, conducted before the House Subcommittee on Legislative Oversight on June 2, 1958 (which hearings were held subsequent to the 1958 decision by the Court of Appeals affirming the Commission's decision), it was brought out that while the case was pending before the Commission, a resident of Orlando made an *ex parte* presentation regarding the comparative hearing to a member of the Commission. In light of this fact, the Solicitor General and the Commission recommended that the denial of Certiorari should not foreclose any future action which the Commission might take with regard to the information con-

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[1] *WORZ, Inc., et al.*, 22 F.C.C. 1254 (1957).

[2] *WORZ, Inc.* v. *Federal Communications Commission*, 257 F.2d 199, 103 U.S. App. D.C. 195 (1958).

tained in the Congressional hearings. This Court, on October 27, 1958, vacated the judgment of the Court of Appeals, and, in light of the testimony before the House Committee, remanded the case to the Court of Appeals.[3]

On October 2, 1958, the Commission on its own motion instituted an inquiry into the allegations made before the House Committee. On March 26, 1959, while the remand was still pending before the Court of Appeals, the Commission concluded that an evidentiary hearing to inquire into the allegations made before the House Committee was warranted. Accepting the recommendations of the Commission, the Court of Appeals remanded the case to the Commission with instructions that the Commission conduct a hearing to determine the nature and source of all *ex parte* pleas made before it, and any other factors that might require either disqualification of any Commissioner from participating in the reopened proceeding or disqualification of any party from receiving any award that might ultimately result.[4] The Court of Appeals retained jurisdiction of the case.[5]

On January 8, 1963, the Commission, after a full evidentiary hearing, issued a Report and Recommendation to the Circuit Court in which it found that improper *ex parte* representations had been made for the benefit of Mid-Florida to former Commissioner Mack

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[3] *WORZ, Inc.* v. *Federal Communications Commission*, 358 U.S. 55 (1958).

[4] *WORZ, Inc.* v. *Federal Communications Commission*, 268 F.2d 889, 106 U.S. App. D.C. 14 (1959).

[5] A request by WORZ for rehearing *en banc* of the remand was unanimously denied on June 5, 1959. WORZ's subsequent Petition for Writ of Mandamus in the Supreme Court was denied, 361 U.S. 805 (1959).

by an Orlando lawyer, William H. Dial, who had on several occasions been specially retained as counsel by Mid-Florida but who had never been retained or authorized to represent it before the Federal Communications Commission in connection with any matter. The Commission concluded that Dial's contacts with Mack were improper, and that, as a result, the original grant to Mid-Florida was void. It also determined, in light of the uncontradicted evidence, that the principals of Mid-Florida had no knowledge of and did not authorize or ratify the *ex parte* representations to Commissioner Mack; it concluded that "nothing revealed in the instant proceedings can be held to detract from Mid-Florida's qualifications as a licensee." (1963 J.A., p. 39)[6] The Commission found that no member of the Commission other than Mack was disqualified from participating in the reopened proceeding. The Commission recommended that the Court of Appeals remand the case to the Commission for a *de novo* decision on the merits of the case based upon the existing record but after further oral argument. (1963 J.A., p. 40)

The Court of Appeals on July 5, 1963 entered a decision which fully accepted the Commission's findings that the principals of Mid-Florida had not been aware of and had not authorized or ratified Dial's improper conduct, and its conclusion that Mid-Florida was, therefore, not disqualified. It held, however, that the Commission should decide, *inter alia*, after new oral argument upon the further proceeding, whether to grant one of the existing applications or whether, in light of

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[6] The 1963 J.A. may be found in the record designated in Case No. 698, October Term, 1963, *WORZ, Inc.* v. *Federal Communications Commission, cert. denied*, 376 U.S. 914 (1964). The 1964 J.A. is the joint appendix of the parties in the instant proceeding, filed herewith.

the age of the record, to reopen the proceeding for an entirely new hearing with new applications.[7]

Although the Court of Appeals remanded the case to the Commission for further substantive decision in conformity with its opinion, it did not retain jurisdiction of the case as it had done upon the first remand to consider the effect of the *ex parte* matter.

Pursuant to the Court's order of July 5, 1963, the Commission held an oral argument on March 2, 1964. Following argument and the receipt of various pleadings from the parties, but without further evidentiary hearing, the Commission on June 16, 1964 released its decision. *WORZ, Inc.* 36 F.C.C. 1535, (attached to 1964 J.A. following p. 69) The Commission re-examamined its earlier conclusion that Mid-Florida had no knowledge of and had not ratified the improper ex parte conduct of Dial, and reaffirmed that finding. It reconsidered *de novo* the comparative qualifications of the applicants based on the record made at the initial comparative hearing and determined that Mid-Florida was the preferred applicant. In addition, the Commission considered the changes in the qualifications of each applicant which had occurred since the time of the initial award and it evaluated the comparative standing of the applicants based on their current qualifications. The Commission concluded that the changes which had occurred in the composition of each applicant re-enforced the comparative superiority of Mid-

[7] The Court of Appeals subsequently denied WORZ's Petition for Rehearing *en banc*. In a concurring statement, Circuit Judge Danaher explained his interpretation of the Court's directions on remand. *WORZ, Inc.* v. *Federal Communications Commission*, 323 F.2d 618, 116 U.S. App. D.C. 316 (1963). WORZ's Petition for Writ of Certiorari from this decision was denied by this Court on February 17, 1964. 376 U.S. 914 (1964).

Florida over WORZ. The Commission concluded that the record was not so stale as to require reopening for new applications. It held that any benefit to Mid-Florida derived from the *ex parte* contract was removed by the completely new public interest determination based upon the current qualifications of the applicants. The Commission decided that "no necessity exists to reopen the record for new applications." 36 F.C.C. 1537. The Commission's decision was in all respects unanimous.

WORZ appealed the Commission's decision. It did not urge that the record should be reopened for new applicants but it affirmatively urged that based on the original record an outright grant of its application was required.

In its opinion of March 4, 1965, entered *per curiam* by Judges Fahy, Burger and McGowan, (Appendix A herein) the Court of Appeals did not disturb the Commission's decision on the merits. The court specifically stated, with respect to the qualifications of the parties, that "we are not prepared to say that the Commission is wrong in its appraisal of the significance to be accorded the lapses with which each party has been charged in these proceedings; and we would agree that, absent any new evidence bearing upon them, the time has come to end litigation about them." Nevertheless, the Court stated it was not prepared to say that the Commission had adequately effectuated the public interest by confining the choice for the facility to Mid-Florida and WORZ "in the light of facts put on the record over ten years ago." In light of what it felt was "a nagging uncertainty" as to whether the facility should be exposed to others, the Court directed the Commission to provide "for the receipt of new applications from persons

who have not hitherto appeared herein" and that "with or without the filing of such new applications, the award of this authority should be set down for a new hearing".

REASONS FOR GRANTING THE WRIT

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), this Court defined the role of the Court of Appeals in relation to the Federal Communications Commission in a situation where the Court of Appeals had prohibited the Commission from considering new applications after that Court's reversal and remand of a prior Commission decision. The Supreme Court held that the Court of Appeals could not create principles of priority to govern the manner in which applications should be considered by the Commission as an indirect result of its power of judicial review, but that the circumstances under which the agency chooses to accept and consider applications was for the agency rather than the Court. This Court made clear that the manner in which the agency should conduct its procedures was left to its own discretion, particularly "whether applications should be heard contemporaneously or successively." This Court has just reiterated these basic principles in *Federal Communications Commission* v. *Taft B. Schreiber*, slip opinion Case No. 482, October Term 1964, Supreme Court of the United States, p. 9, decided May 24, 1965.

In the instant case, the Court of Appeals would prevent the Commission from following its own principles of priority in consideration of applications. Instead, the Court of Appeals has directed the Commission to follow the principles of priority which as a discretionary matter the Commission had followed in the *Pottsville* case. The Court of Appeals clearly exceeded "the Congressional distribution of authority" in directing

the Commission to reopen the record for new applications when the Commission had expressly decided that the proceeding should be limited to the original applicants. *Federal Communications Commission* v. *Taft B. Schreiber, supra,* at p. 11. Whether the Court of Appeals has this authority is a question of fundamental importance to the administration of the Communications Act.

The Court has made clear that the Commission may establish its own procedures. The Federal Communications Commission may decide when applications are timely filed and entitled to comparative consideration. *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, 333 (1945). Likewise, even though elements of prejudgment may be involved, it is for the Commission alone to determine whether it will grant an application during the pendency of a rule making proceeding whose outcome could prohibit the grant of such an application. *WJR, The Goodwill Stations* v. *Federal Communications Commission,* 337 U.S. 265, 272 (1949). It is settled that the Commission need not follow the procedures approved in *WJR* and, in its discretion, may withhold granting of applications because of the pendency of rule making proceedings.[8] The question here is whether the principles prohibiting the Courts from interfering in the procedures established by the Commission prevent the Circuit Court from directing the Commission to reopen the record of the case below to entertain new applications.

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[8] *Kessler* v. *Federal Communications Commission,* 326 F.2d 673, 117 U.S. App. D.C. 130 (1963); *Harvey Radio Laboratories, Inc.* v. *United States,* 289 F.2d 458, 110 U.S. App. D.C. 81 (1961); *Mesa Microwave, Inc.* v. *Federal Communications Commission,* 262 F.2d 723, 105 U.S. App. D.C. 1 (1958).

Whether the Court of Appeals rejected the Commission's decision as to the priority in which the Commission would consider applications because it felt the old record was stale or because it felt that the *ex parte* nature of the case required such action, its action lay outside the area of authority conferred upon it by Congress to review decisions of the Federal Communications Commission.

1. *Staleness*—To the extent that the basis for the Court's remand rested on its view that the original record before the Commission was stale, it has substantially departed from governing principles of review of agency determinations not to reopen a proceeding because of the age of the administrative record. The question of whether an administrative record is "stale" is, except under the most extraordinary circumstances, for the agency alone to decide, particularly where, as here, the agency has considered the question.

This Court's decision in *United States* v. *Pierce Auto Lines*, 327 U.S. 515 (1946) is particularly pertinent. In that case the Court reiterated that reopening of administrative records for staleness is a determination confined to the discretion of the administrative body before whom the case is initially brought. "Only a showing of the clearest abuse of discretion could sustain an exception to that rule." 327 U.S. at 535. This Court in *Pierce* further stated, in reversing a lower court decision that an administrative record should be reopened because it was stale, that:

> "We think the Court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that 'the Courts' must in a litigated case be the arbiters of the paramount public inter-

> est' [footnote omitted]. This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. *It cannot substitute its own view concerning what should be done* . . ." (327 U.S. at 535-536, emphasis added).

A decision to hold a new comparative television hearing involves a delicate balancing of considerations which Congress has committed to an expert agency to appraise. Such considerations as administrative efficiency, the amount of time that has elapsed and the amount of time required to hold a new proceeding, the equities of the parties in obtaining a final decision after protracted litigation, and the relationship between the lapse of time and the purpose of the administrative proceeding are all involved in a judgment whether a new proceeding should be conducted. As this Court has stated in a similar context, the courts are not,

> "to weigh these or countervailing considerations. Nor should we require the [agency] to make a quantitative appraisal of the relevant factors, assuming the unlikely, that such an appraisal is feasible. As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the [agency's] conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions * * *'; and they are none the worse for it. Chicago Burlington & Quincy R. Co. v. Babcock, 204 U.S. 585." *National*

Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

Of course, there may be situations in which an administrative agency would abuse its discretion by not reopening a record for staleness. Few cases involving such agency error, however, have been found. Indeed, except for this Court's decision in *Atchison, etc. R. Co.* v. *United States*, 284 U.S. 248 (1932), and two recent cases involving substantially different considerations[9] we know of no instance where a Court has directed a federal administrative agency to reopen a proceeding before it because of "staleness" *per se*. The *Atchison* case itself has been limited by this Court to its special facts and now stands virtually alone. *United States* v. *Northern P.R. Co.*, 288 U.S. 490 (1933); *St. Joseph's Stockyards Co.* v. *United States*, 298 U.S. 38 (1936); *Baltimore & O.R. Co.* v. *United States*, 298 U.S. 349, 388-389 (Brandeis J., concurring) (1936); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944); *United States* v. *Pierce Auto Lines*, 327 U.S. 515 (1946).

The direct error of the Court of Appeals in this case was its attempt to replace the judgment of the Commission with its own and to formulate its decision in terms of staleness although the agency had considered this aspect of the case. Unless the decision of the Commission in this regard had no reasonable basis upon which it could rest, the Court of Appeals could not find that there was an abuse of discretion merely because it

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[9] *American Committee for Protection of Foreign Born* v. *Subversive Activities Control Board*, 33 U.S. Law Week 4336 (1965); *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 33 U.S. Law Week 4339 (1965).

disagreed with the procedure being followed by the Commission. The Court's opinion that "so vital a community facility as is involved here" should be "exposed to what may possibly be wider interest than those represented by these two applicants," constituted nothing more than a substitution of its judgment for that of the Commission as to the manner in which applications for the facility should be considered by the agency.

In this case the power of the Court of Appeals to find that the record is stale and to direct the acceptance of new applications cannot be derived from its conception of the importance of the facility being awarded by the Commission. The franchises, authorizations, charges and matters involved in the cases referred to above were equally "vital" to the public. Similarly, it is for the Commission, not the Court of Appeals, to judge whether the applicants are of sufficient quality to assure satisfaction of the public interest by confining the choice to them. The Federal Communications Commission, like other administrative agencies, "was created for the purpose of using its judgment and its knowledge," on exactly such a question. *Chicago, B. & Q. R. Co.* v. *Babcock*, 204 U.S. 585, 598 (1907); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953); *Federal Communications Commission* v. *Taft Bd. Schreiber*, *supra*, p. 11.

The Court of Appeals' *de novo* establishment of administrative procedures in this case is aggravated by its disregard of the Commission's action considering the comparative status of the applicants in light of current conditions. The Commission's action, therefore, was not based on a "stale" record but on an updated record.

Moreover, the Court's decision that the Commission reopen the record to accept new applications was arrived at *sua sponte* and without being presented to the Court by any party. No party below urged upon the Court that the Commission had erred in deciding not to have a new hearing with new applicants because of "staleness" or otherwise. No stranger to the proceeding requested the Commission or the Court that it be permitted to intervene and prosecute an application for Channel 9 at Orlando.

Indeed, the issue of whether reopening of the record for new applicants should be required was not even open for judicial review. Section 405 of the Communications Act provides, in pertinent part, that,

> "the filing of a Petition for Rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review * * *(2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass." 75 Stat. 421, 47 U.S.C. 405.

This Court has held, in interpreting a similar statute, Section 10 of the Natural Gas Act, (52 Stat. 831-832, 15 U.S.C. § 717r(a) and (b)) that such a provision not only prohibited a party on appeal from relying on an issue which had not been presented to the administrative agency in a Petition for Rehearing but also prohibited the reviewing court from considering, *sua sponte*, the same objection. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955). The same rationale prohibits the Court of Appeals from expanding the scope of review contem-

plated by Section 405 of the Communications Act to encompass aspects of the contested decision from which no appeal has been taken.[10]

In summary, under the terms of the Court of Appeals' remand order of July 5, 1963, the Commission expressly considered whether new applications should be received because of the passage of time that had occurred. The Commission's view that no new proceedings should be instituted was based on its expert appraisal of the entire and updated record and the fact —concurred in twice by the Court of Appeals—that "neither of the applicants is disqualified from becoming a licensee." 36 F.C.C. at 1537. The Commission's decision not to reopen the record was a considered one; it has a reasonable basis; it is the product of its expert judgment. The Court of Appeals could not set aside, *sua sponte,* that decision and replace it with what it thought would be a more reasonable result without entering the administrative province and thereby de-

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[10] Unlike the provisions of the Radio Act of 1927 where the Court of Appeals was given power to "alter or revise the decision appealed from and enter such judgment as to it may seem just," (Section 14, 44 Stat. 1169), the Court of Appeals today has no administrative functions and it has no duties as "a superior and revising agency in the same field." *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 467 (1930). Section 402(b) of the Communications Act and Section 10(e) of the Administrative Procedure Act, 47 U.S.C. 402(b) and 5 U.S.C. 1009(e). See also, *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17 (1952); *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388-389 (1946); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953).

parting from governing standards of judicial review.[11]

2. *The Nature of the Proceeding*—The Court of Appeals apparently assumed that it had broad authority to direct the administrative procedures to be followed —as broad as if it were acting in a *de novo* capacity— because of the *ex parte* aspect of the case. While it cast its decision, in part, in terms of staleness, it is apparent from its opinion that the *ex parte* nature of the case served as the basis for the exercise of its extraordinary action.[12] Whether the Court of Appeals

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[11] The applicable provisions of the Communications Act do not extend to the Court of Appeals, in this case, greater authority than the general principles governing review of administrative action which have been enunciated by this Court. Section 402(h) of the Communications Act vests in the Court of Appeals a general equity power to direct the Commission to carry out decisions of the Court of Appeals "in the event that the Court shall render a decision and enter an order reversing the order of the Commission." But neither the Communications Act nor the Administrative Procedure Act enables the Court to direct further administrative proceedings where there is otherwise no substantive error in the Commission's actions. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 20 (1952). In this case, the Court specifically affirmed the Commission's findings regarding the qualifications of Mid-Florida Television Corp. to be a licensee of Channel 9 in Orlando. The Court of Appeals' acceptance of the Commission's decision that Mid-Florida had no knowledge of and had not ratified the *ex parte* approaches of Dial was the same conclusion reached by an earlier panel of the Court. 323 F.2d 618, 116 U.S. App. D.C. 316 (1963). The Commission, itself, twice examined this question and found that no culpable conduct could be attributed to Mid-Florida. Whether the fact that an *ex parte* contact had been made forms a basis for the Court's action is discussed *infra*.

[12] This is made clear by the recent decision of the Court of Appeals in *Jacksonville Broadcasting Corporation* v. *Federal Communications Commission*, Case No. 18,181 C.A.D.C., decided May 6, 1965 (not yet reported). In that case, the Court directed the Commission to follow the same procedure as here solely on the basis of the *ex parte* aspect of that proceeding. The Court specifically relied on its opinion here under review.

has such broad reviewing powers in an *ex parte* case is a question of first impression requiring review by this Court. The proper administration of the Communications Act requires that the limits of the Court of Appeals' function to review the Commission's efforts to cleanse its own processes be definitively established.

In exercising unprecedentedly broad reviewing authority in this case, the Court of Appeals could find no greater basis for upsetting the Commission's decision than its "nagging uncertainty" as to the result and its remark that the case has been beset throughout by a variety of "dubious circumstances." Of course, no contested adjudicatory proceeding involving questions of fact can be resolved with "certainty." And no reason has been articulated why such a standard should be imposed upon the Commission. No less so than the Court, the Commission has as strong an interest in seeing that its processes are not tainted. Its considered opinion in this case should be given as much weight as in any other proceeding. For, as this Court stated in *Pottsville,* the "courts are not charged with general guardianship against all potential mischief in the complicated task of government." And "[i]nterference by the courts is not conducive to the development of habits of responsibility in administrative agencies." *Federal Communications Commission* v. *Pottsville Co.,* 309 U.S. 134, 146 (1940).

The Commission was not insensitive here to the important questions which had been raised as a result of the *ex parte* contact which had taken place. It conducted a full evidentiary hearing and concluded that Mid-Florida could not be held morally or legally responsible for the unauthorized *ex parte* contact. Because the *ex parte* contact had been committed,

the Commission on its own motion voided the original grant and required a *de novo* determination by Commissioners fully qualified to participate. Upon review of the old record and a current evaluation of the applicants, it determined that Mid-Florida was best qualified to operate the Channel 9 facility. Having cleansed its processes of any previous taint, the decision it arrived at was clearly reasonable. Moreover, the Court of Appeals affirmed the substantive decisions made by the Commission concerning the qualifications of the winner. Having found a reasonable basis in the record for the decisions arrived at by the Commission, the Court could not, under the principles of *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474 (1951), because of its nagging uncertainties as to the result, attempt to indirectly set aside the Commission's decision when it had no power to do so directly. Once it had been determined that the Commission's decision was free of substantive error, the Court was required to leave undisturbed the Commission's determinations as to how its processes would be cleansed.

CONCLUSION

This case poses fundamental questions concerning the division of responsibilities between the Federal Communications Commission and the Court of Appeals for the District of Columbia Circuit in a novel and important factual context involving the Commission's attempt to rectify abuse of its own processes. The Court of Appeals for the District of Columbia Circuit has exclusive appellate jurisdiction to review decisions and orders of the Federal Communications Commission involving the Commission's adjudicatory functions in issuing radio licenses and construction permits. Sec-

tion 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b). The importance of the case is manifest. This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 1, 1965

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,772

WORZ, INC., APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.
MID-FLORIDA TELEVISION CORPORATION, INTERVENOR.

Appeal from a Decision of the
Federal Communications Commission

Decided March 4, 1965

Mr. Edward P. Morgan with whom *Mr. Edward S. O'Neill* was on the brief, for appellant.

Mr. John H. Conlin, Counsel, Federal Communications Commission, for appellee. *Messrs. Henry Geller,* General Counsel, *Daniel R. Ohlbaum,* Deputy General Counsel and *Michael Finkelstein,* Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Paul Dobin with whom *Mr. Martin Jay Gaynes* was on the brief, for intervenor. *Mr. Leonard H. Marks* also entered an appearance for intervenor.

Before FAHY, BURGER and MCGOWAN, Circuit Judges.

PER CURIAM: This case concerns an award of authority for a television station in Orlando, Florida, for which two competing applications were first filed, and the evidence taken, over a decade ago. The reasons why our initial affirmance of the grant to one of such applicants, *WORZ, Inc.* v. *FCC,* 103 U.S.App.D.C. 195, 257 F.2d 199 (1958), did not finally resolve the matter appear in our later decision of the same name, 116 U.S.App.D.C. 316, 323 F.2d 618 (1963), *cert. denied,* 376 U.S. 914 (1964). They have to do with the disclosure, subsequent to our first review, of *ex*

parte representations to one of the Commissioners by an attorney for the successful applicant. This caused the Supreme Court to vacate our judgment, *WORZ, Inc.* v. *FCC*, 358 U.S. 55 (1958); and we remanded the matter to the Commission with directions to inquire into the question of improper conduct and the possible disqualification of any party found guilty thereof. Such a hearing was held by the Commission's Chief Examiner, who recommended that the successful applicant, Mid-Florida Television Corporation, be disqualified. A majority of the Commission did not accept the Chief Examiner's finding that Mid-Florida's principals had known of their attorney's activities on their behalf, and concluded to set the issue of the comparative award for a new oral argument upon the original record. The Chairman of the Commission dissented. He agreed with the Chief Examiner's finding of guilty knowledge; and, although he would not have elevated this to an absolute disqualification, his recommendation was that we authorize the Commission to consider in the course of the proposed new argument (1) whether a demerit should be awarded to Mid-Florida by reason of its guilty knowledge, and (2) whether the record should not be reopened for new applications from any and all persons who might be interested.

We explicitly stated our acceptance of "the view that neither Mid-Florida nor WORZ is disqualified." 116 U.S. App.D.C. at 317, 323 F.2d at 619. But we agreed with the Commission's Chairman, rather than with its majority, as to what the Commission should be authorized to consider on reargument. Indeed, we went further and specified that the reconsideration should include other incidents which cast doubt upon the qualifications of both applicants. In particular, we broadly invited the Commission to consider whether, in the light of this unsatisfactory history and the staleness of the original record, the public interest would not be best served by reopening the proceedings, permitting new or additional ap-

plications to be filed, and making a choice among them on the basis of a new record. Our concern in this regard was emphasized by the concurring statement filed by Judge Danaher in explaining his vote against rehearing *en banc*.

The present review proceedings brings to us the Commission's determination, after reargument, not to avail itself of our invitation but, instead, to reaffirm the award to Mid-Florida on the basis of the record made ten years ago. Although the Commission apparently believed itself under no legal necessity of doing so, it has reexamined its refusal to accept its Chief Examiner's findings as to guilty knowledge of the *ex parte* communications on the part of Mid-Florida, and it adheres to that refusal. It does not believe that any other facts justify disqualification of either applicant or the giving of comparative demerits; and, looking to the original record, it finds Mid-Florida to be the better qualified, a choice which, we are reminded by a look at the old record, is contrary to that first recommended in 1955 by the examiner who presided at the hearing.

The Commission has, of course, a large area of discretion to decide between competing applicants for the privileges committed to its care, both generally and under the terms of our last remand in this proceeding. But this case has been beset throughout by a variety of dubious circumstances which, at the best, have prolonged the ultimate choice an unconscionably long period beyond the assembling of the facts upon which that choice must of necessity be based, and which, at the worst, leave a nagging uncertainty as to whether so vital a community facility as is involved here should not be exposed to what may possibly be wider interests than those represented by these two applicants. We are not prepared to say that the Commission is wrong in its appraisal of the significance to be accorded the lapses with which each party has been charged in these proceedings; and we would agree

that, absent any new evidence bearing upon them, the time has come to end litigation about them. Neither are we prepared to say, however, that the guardianship of the public interest, entrusted by Congress to the Commission, is adequately effectuated by confining the choice to these two applicants in the light of facts put on the record over ten years ago. We think this proceeding should be reopened, with an adequate opportunity provided for the receipt of new applications from persons who have not hitherto appeared herein. With or without the filing of such new applications, the award of this authority should be set down for a new hearing. Temporary authority for the continued operation of the station may be granted by the Commission in its discretion.

The case is remanded to the Commission for further proceedings not inconsistent herewith.

It is so ordered.

APPENDIX B

Statutes Involved

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001 et seq.:

> SECTION 10(e): Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure re-

quired by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.:

SECTION 4(j): The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No. commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

SECTION 402(b): Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

SECTION 402(g): At the earliest convenient time the court shall hear and determine the appeal upon the record before it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

SECTION 402(h): In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 204

MID-FLORIDA TELEVISION CORP., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND WORZ, INC., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT WORZ, INC. IN OPPOSITION

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BRIEF FOR THE RESPONDENT WORZ, INC. IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. The text thereof appears as Appendix A to the Petition filed herein.

JURISDICTION

The judgment of the Court of Appeals remanding this cause to the Federal Communications Commission was entered on March 4, 1965. The Petition for a Writ

of Certiorari was filed on June 1, 1965. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The respondent respectfully submits that the question presented is: Whether the Court of Appeals may, consistent with its authority to review decisions of the Federal Communications Commission, set aside the Commission's grant of a television construction permit and remand the proceedings to the Commission for a new hearing where: (1) the record upon which the Commission based its decision had been compiled approximately ten years before the decision; (2) the Commission had refused to conduct a new hearing despite its admission that decisionally significant changes had occurred in the comparative structure of the original applicants since the existing record had been compiled; (3) the Commission had attempted to supplement the existing record by means of an *in camera* proceeding; (4) a proper record could only be compiled by means of a full evidential hearing, and (5) the question of the legality of the Commission's proceedings was properly before the Court of Appeals.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Petition, at p. 3.

STATEMENT

Almost thirteen years ago, the Respondent, WORZ, Inc. (hereinafter WORZ), filed an application with the Federal Communications Commission (hereinafter Commission) for a permit to construct a commercial television station on Channel 9 in Orlando, Florida.

Subsequently, on November 16, 1963, the Petitioner, Mid-Florida Television Corp. (hereinafter Mid-Florida), filed its application for the same facility. As is required in the case of such conflicting applications, an evidential hearing was held before one of the Commission's Hearing Examiners in December, 1954, with further hearing sessions in March, 1955. Upon the conclusion of the full evidential hearing, the Hearing Examiner, who had presided throughout the hearing and had observed all of the witnesses, rendered a decision on August 10, 1955, granting the application of the Respondent, WORZ, and denying the application of the Petitioner, Mid-Florida. In every area of comparative consideration, the Examiner found for WORZ over Mid-Florida.[1] Thereafter, the case was considered by the Commission upon exceptions filed by Mid-Florida. By its Decision of June 7, 1957 (22 F.C.C. 1254), the Commission reversed its Examiner and granted the application of Mid-Florida. The Commission's Decision was affirmed by this Court.[2]

WORZ's Petition for a Writ of Certiorari was granted on October 27, 1958,[3] this Court vacating the judgment of the Court of Appeals upon being advised

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[1] In such cases, the decision to grant one of a number of competing applications turns in great part upon a consideration of what have come to be known as the "standard comparative criteria." Included among the criteria are such factors as the residence, civic participation, broadcast experience and proposed operational function of stockholders and/or principals in the applicant group, as well as the applicant's proposals in such areas as programming, studios, equipment and staffing.

[2] *WORZ, Inc.* v. *Federal Communications Commission,* 257 F. 2d 199, 103 U.S. App. D.C. 195 (1958).

[3] *WORZ, Inc.* v. *Federal Communications Commission,* 358 U.S. 55 (1958).

that testimony before a Congressional committee had revealed that certain *ex parte* representations in behalf of Mid-Florida had been made to Commissioner Richard A. Mack during the pendency of the case before the Commission. The Court of Appeals, in turn, vacated the Commission's grant to Mid-Florida and remanded the case to the Commission with instructions to hold, "with the aid of a specially appointed hearing examiner," an evidential hearing looking toward full disclosure of the facts attending the *ex parte* revelations previously adduced and to determine whether either of the parties should be disqualified by reason thereof.[4]

Pursuant to the directive of the Court of Appeals, the Commission's Chief Hearing Examiner was specially appointed to conduct a hearing into the *ex parte* matters. The Chief Hearing Examiner, subsequent to a full evidential hearing, issued an Initial Decision (1963 J.A., pp. 18-33)[5] holding, in substance, that the Commission's 1957 grant to Mid-Florida was void by reason of the participation of Commissioner Mack therein and that the petitioner here, Mid-Florida, should be absolutely disqualified from participating in further proceedings by reason of the fact that it had been aware of and had ratified *ex parte* representations made to Commissioner Mack in its behalf. This holding was premised upon the Examiner's findings that (1) one William H. Dial, an Orlando, Florida, attorney in the employ of Mid-Florida, had, while the matter was *sub judice* before the Commission, repeatedly made

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[4] *WORZ, Inc.* v. *Federal Communications Commission*, 268 F. 2d 889, 106 U.S. App. D.C. 14 (1958).

[5] See f.n. 6, Petition, for explanation of Joint Appendix references.

extra-record overtures to Mack urging the grant of Mid-Florida's application and (2) that the denials of Mid-Florida's principals that they had any knowledge of Dial's activities were unacceptable as being "unreasonable, incredible and contrary to human experience," (1963 J.A., p. 29). The Commission, however, rejected the Initial Decision of its Chief Hearing Examiner and, in its January 8, 1963 Report and Recommendation to the Court of Appeals (1963 J.A., pp. 32-46), held that Mid-Florida had not ratified and had no knowledge of the *ex parte* representations which had been made in its behalf. Then-Chairman Minow dissented from the Commission's report, noting that "The Examiner who heard and saw the witnesses found that responsible officers and stockholders of Mid-Florida knew of, and ratified, Mr. Dial's improper approaches. The record does not justify the majority's reversal of this finding." (1963 J.A., p. 41).[6]

The majority of the Commission recommended to the Court of Appeals that it be authorized to reconsider the case on the basis of the existing record and further oral argument, but with no further evidential hearing. Chairman Minow recommended, however, that the Commission's further proceedings should include the consideration of a comparative demerit against Mid-Florida on the basis of the Chief Hearing Examiner's finding, and his agreement therewith, that Mid-Florida was aware of the *ex parte* representations made in its behalf. The Chairman also recommended

[6] The office of the General Counsel, FCC, which participated in the proceedings before the Chief Hearing Examiner, also strongly urged the Commission to absolutely disqualify Mid-Florida, concluding from the evidence adduced that "one or more of the principals of Mid-Florida directly or indirectly secured, aided, confirmed, ratified, or knew of Dial's misconduct."

that the Commission be authorized to consider—after new oral argument—whether to grant one of the existing applications or to reopen the record for new applications.

Upon consideration of the Commission's Report and Recommendation, the Court of Appeals stated, "We accept the view that neither Mid-Florida nor WORZ is disqualified; but in line with the Chairman's position we hold that the Commission is authorized to decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications."[7] Further, the Court of Appeals stated:

> "Nothing we have said is intended to preclude the Commission from deciding that the record is so stale, the filing of new applications should be permitted. Mid-Florida has been operating on Channel 9 at Orlando under program test authority issued January 31, 1958, pursuant to the Commission's rules, but this authorization was granted prior to our affirmance on May 15, 1958, of the Commission's first comparative decision. Revelations as to various situations prior to that date and the more recent developments may point to the need for a new public interest determination of who should have the license to operate on the channel." (footnote omitted)[8]

The further proceedings before the Commission consisted essentially of (1) oral argument by the parties and the Commission's Broadcast Bureau, and (2) an *in camera* review, by the Commission, of certain docu-

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[7] *WORZ, Inc.* v. *Federal Communications Commission*, 323 F. 2d 618, 619; 116 U.S. App. D.C. 316, 317 (1963), cert. denied, 376 U.S. 914 (1964).

[8] *Id.* at 620 and 318, respectively.

ments (ownership reports) filed by the parties over the years in connection with matters unrelated to the comparative proceedings. At oral argument, the Commission's Broadcast Bureau stated: "We strongly urge the Commission to reopen the record in this proceeding, to permit the filing of new applications. While we recognize there is no absolute disqualification of either of the applicants, we recognize the record in this decision is so stale that a comparative selection would be unrealistic, because of conditions that have occurred since the Commission's original assessment of the comparative differences betweeen the applicants in June, 1957." (1964 J.A., p. 39).

In its Decision of June 12, 1964 (36 F.C.C. 1535, appended to 1964 J.A.), the Commission affirmed the June 7, 1957 grant of the Mid-Florida application, having concluded—based upon the further proceedings described above—that "no necessity exists to reopen the record for new applications" and that it did not believe "that the record of this proceeding is so stale that the filing of new applications should be permitted." (36 F.C.C. 1537).

WORZ appealed the Commission's decision on the grounds, *inter alia,* that the Commission was not entitled to determine the comparative standing of the parties since the closing of the original record in 1955 by means of an *in camera* review of documents filed by the parties with the Commission for purposes unrelated to the comparative hearing. WORZ argued further, as it had during the entire course of the proceedings, that a comparison on the basis of the original record entitled it to a grant but that if that record were fatally stale, the record must be reopened and a new evidential hearing held.

In its opinion reversing the Commission and remanding the proceedings (Appendix A, Petition), the Court of Appeals related the extraordinary history of the case and, referring to its 1963 remand to the Commission for further proceedings, noted that it had particularly "invited the Commission to consider whether, in the light of this unsatisfactory history and the staleness of the original record, the public interest would not be best served by reopening the proceedings, permitting new or additional applications to be filed, and making a choice among them on the basis of a new record." The Court noted further that the Commission had rejected such a procedure and had determined, instead, "to reaffirm the award to Mid-Florida on the basis of the record made ten years ago." After specifically acknowledging the Commission's large area of discretion in such matters, the Court pointed out that the case had been beset by "a variety of dubious circumstances [which had] prolonged the ultimate choice an unconscionably long period beyond the assembling of the facts upon which that choice must of necessity . . . be based". The Court stated further that it was not prepared to say "that the guardianship of the public interest, entrusted by Congress to the Commission, is adequately effectuated by confining the choice to these two applicants in the light of facts put on the record over ten years ago," and ultimately held that with or without the filing of applications by new parties, "the award of this authority should be set down for a new hearing."

ARGUMENT

By reason of the Court of Appeals' judgment and opinion below, the Federal Communications Commission is now required to compile a current record upon which to base its choice as to what party shall operate the commercial television station on Channel 9, in Orlando, Florida. The Commission has not been denied the right to bring to bear its discretion and expertise in ultimately making such a judgment nor has any party to the prior proceedings conclusively gained or irrevocably lost a right by reason of the Court's decision. Quite simply, the Court's action goes essentially to assuring the fundamental requirement that administrative decisions in such matters be premised upon a viable and meaningful record.

The petitioner's reliance upon the pronouncements of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) and in the recent case of *Federal Communications Commission* v. *Taft B. Schreiber* (slip opinion, Case No. 482, decided May 24, 1965) is submitted as ill-founded. Although these cases, as do others cited by Mid-Florida, unquestionably require that reviewing courts refrain from imposing their judgment upon administrative agencies in matters reserved to the agencies by Congress, it is submitted that they do not foreclose a reviewing court from assuring that the agency has complied with the basic requirements common to any adjudicatory function—be it administrative or judicial. In the instant case it is tolerably clear that the Commission, despite its formal pronouncement to the contrary, was itself convinced that the ten year old record upon which it undertook to base its final comparative decision was fatally stale. This conclusion necessarily

flows from the fact that the Commission, upon the remand from the Court of Appeals, engaged in a patently unsuccessful and invalid attempt to supplement the existing record by means of an *in camera* proceeding apparently designed to avoid the necessity of reopening the record. Thus, the Court of Appeals' directive to reopen the record constitutes nothing more than a requirement that the Commission come squarely to grips with the fact that by reason of the extraordinary delay occasioned in the instant case, a current record must be compiled.

Reference to the opinion below leaves no doubt that the Court of Appeals was, in deciding the case, acutely aware of the fact that the choice between competing applicants for a broadcast license is essentially a matter for the Commission's judgment.[9] It is further apparent from the Court's opinion that the ultimate choice is to be made exclusively by the Commission, applying its standard hearing procedures and weighing the comparative standing of the parties according to its informed judgment and without conditions imposed by the Court. The exclusive effect of the Court's decision is to document the obvious fact that the choice of an applicant to operate the subject facility has been prolonged "an unconscionably long period beyond the assembling of the facts upon which that choice must of necessity be based" and to require the Commission to compile a current record before making *its* choice.

Mid-Florida argues that there is no precedent for such action by a reviewing court and, by implication,

[9] "The Commission has, of course, a large area of discretion to decide between applicants for the privileges committed to its care, both generally and under the terms of our last remand in this proceeding." (Opinion, p. 3a, Petition).

that it is therefore beyond the bounds of allowable judicial review. There is, in fact, a paucity of authorities turning on the precise question at issue, i.e., the "staleness" of an administrative record. Moreover, it is probable that a factual pattern as presented by the instant case has not occurred in the past and will not occur in the future. Far from supporting Mid-Florida's position, however, the absence of direct precedents and the factual uniqueness here involved tend, it is submitted, to support the proposition that the Court of Appeals was here confronted with an extraordinary situation unquestionably requiring the positive implementation of its corrective powers.

Mid-Florida correctly suggests that the case of *Atchison, etc. R. Co.* v. *United States,* 284 U.S. 248 (1932)—one of the few cases dealing with "staleness" per se—has been restricted to its special facts. Although this Court refused to apply the *Atchison* doctrine in the case of *United States* v. *Pierce Auto Lines,* 327 U.S. 515 (1949)—also relied upon by Mid-Florida—it is to be noted that in both *Atchison* and *Pierce* the reviewing court had been asked to order a rehearing in light of after-developing circumstances extrinsic to the hearing issues themselves, i.e., the depression and World War II. In the instant case, of course, the Court of Appeals has neither been asked to nor has it ordered a rehearing in light of any extinsic circumstances nor, in fact, has it ordered a rehearing as such. As noted above, its order goes exclusively to assuring that the Commission has before it a current, meaningful record of the facts as they bear on the very nature and composition of the party to whom the grant to operate Channel 9 will ultimately be awarded. It must, of course, be borne in mind here that such pro-

ceedings before the Commission turn almost exclusively upon the composition of a given applicant in terms of the individuals involved; their financial, legal and technical qualifications; their experience, interests, etc. Thus, such proceedings are markedly distinct in character from rate or similar proceedings wherein the composition of the administrative litigant is merely an incident of the proceedings. Thus, although the pronouncements of this Court regarding staleness of administrative records, in such cases as *United States* v. *Pierce,* supra, are clearly controlling in such matters, it would seem apparent that they should not be taken to prohibit the action taken by the Court of Appeals in the instant case.

The record upon which the Commission has now undertaken to base its choice as to which applicant is better qualified to operate the subject television facility was compiled in late 1954 and early 1955. By reason of extraordinary circumstances developing thereafter, it was not until almost ten years later that the Commission issued its final decision. Two years prior thereto, however, the Commission had been invited to consider the question of the staleness of the original record by reason of the Court of Appeals' remand in *WORZ; Inc.* v. *Federal Communications Commission,* 323 F. 2d 618, 116 U.S. App. D.C. 316 (1963)[10] It was at this point in the proceedings that the Commission clearly demonstrated its intention to avoid reopening the record and to accord only semantical significance to the issue of staleness of the record.

In its final decision (36 F.C.C. 1535, 1946 J.A.), the Commission stated that it did not believe "that the

[10] See "Statement", p. 6, supra.

record of this proceeding is so stale that the filing of new applications should be granted," and further noted that the award would, therefore, "be based upon an evaluation of the significant differences between WORZ and Mid-Florida as shown under the comparative criteria" (36 F.C.C. at 1537). Nevertheless, the Commission thereupon undertook to supplement the existing record by means of an *in camera* review of Commission records for the admitted reason that "Changes have occurred in the composition of both applicants with the passage of time." (36 F.C.C. at 1539). That such a procedure is a patently ineffective and invalid substitute for the required evidential hearing in such cases is of secondary importance here.[11] Of significance, however, is the *fact* of the Commission's attempt to supplement the existing record, for the existing record either was or was not a sufficient vehicle for decision. Despite the fact that the Commission characterized the record as not being "so stale" as to require reopening and the filing of new applications, its own actions belied its words. Thus, it is submitted, did the Commission virtually compel the Court of Appeals to require, as a minimum procedural as well as substantive standard, the compilation of a current record by means of a "new hearing."

Mid-Florida suggests (p. 11, Petition) that such considerations as administrative efficiency and the time required to hold new proceedings are among those reserved to the "expert agency" to appraise in connection with a decision to hold a new comparative hearing.

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[11] This Court has, of course, upheld a party's right to a full and fair evidential hearing in such cases of administrative adjudication, e.g., *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956).

That such considerations are germaine and ordinarily within the agency's discretion is true. It may not be reasonably argued, however, that such considerations are to be accorded decisional precedence over the concomitant necessity that the agency adhere to minimal substantive and procedural requirements. It is unfortunately apparent that in this instance the Commission has accorded concepts such as administrative efficiency and the time involved in a new hearing undue weight. The Commission's determination to rid itself of what has unquestionably been a troublesome and distasteful proceeding is understandable. Nonetheless, this Court has held that an administrative agency may not "compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 304 (1937). Further, the Court has held that where an administrative agency undertakes an adjudicatory function—as opposed to its more general pursuits such as rule-making or general fact-finding—"it is imperative that [the agency] use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). A necessary incident of the requirement for an evidential hearing in such matters is the compilation of a current, meaningful record upon which the agency may bring to bear its expertise. That "minimal requirement", traditionally associated with the judicial process, has not been met in this instance.

Mid-Florida's suggestion (pp. 14-15, Petition) that the issue of reopening the record was not before the Court of Appeals is ill-founded. As noted above

(pp. 6-7), the issue was initially posed to the Commission upon the *ex parte* remand in 1963 and was raised on appeal below by WORZ. The appropriateness of the issue has never been contested by the Commission and in fact the issue has been considered on its merits and decided, although erroneously, by the Commission. Thus, it is apparent that the issue had been before the Commission for the purpose of Section 405 of the Communications Act and was properly before the Court on appeal.

WORZ does not agree with Mid-Florida's argument that the decision of the Court of Appeals was prompted by reason of the *ex parte* aspects of the case as such (pp. 16-18, Petition). As has been pointed out, the Court was specific in its holding that the Commission's decision had been delayed "an unconscionably long period beyond the assembling of the facts" upon which that decision must be based and that, therefore, the matter should be "set down for a new hearing." It is true, of course, that the unconscionable delay of which the Court of Appeals spoke was the *result* of the *ex parte* aspects of the case and it is also true that by reason of those developments the integrity of the Commission's processes themselves were at issue. There is no support, however, for the suggestion that the Court's decision rested exclusively upon the *ex parte* nature of the case. Needless to say, had the Commission in 1957 accepted the Examiner's decision on the comparative issues or the Chief Hearing Examiner's decision on the *ex parte* matters in 1963, the case in all probability would have developed so as to have precluded the present state of affairs. Be that as it may, it is manifest that the Court of Appeals has addressed itself to the state of the Commission record, without according decisional significance to the *ex parte* aspects as such.

CONCLUSION

The Federal Communications Commission is accorded a wide area of discretion in dealing with those matters submitted to its care by Congress. Its area of discretion is particularly broad in instances where the Commission is called upon to apply its expertise in choosing among applicants for broadcast facilities. It is precisely for the reason that the Commission is afforded such freedom within its mandate that it must remain acutely aware of its concomitant obligation to observe the fundamental requirements of the adjudicatory process. In what is submitted as an understandable albeit lamentable attempt to rid itself of a disturbing matter, the Commission has here failed to observe the most fundamental aspect of the adjudicatory process, i.e., the compilation of a reasonbly accurate and current record upon which to base its expert judgment. The Court of Appeals was entitled, indeed obliged, to require the Commission's adherence to this basic principle. In so doing, the Court has not invaded the Commission's province. It remains to the Commission, within its wide area of discretion and in the light of its expertise, to make an unfettered decision as to who will operate the subject broadcast facility. The instant case turns upon extraordinary, if not unique, circumstances. The Court of Appeals' decision is clearly warranted in light thereof. The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 204

MID-FLORIDA TELEVISION CORP., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND WORZ, INC., *Respondents*

MOTION TO DIRECT THE FEDERAL COMMUNICATIONS COMMISSION AND THE SOLICITOR GENERAL TO FILE A STATEMENT OF THEIR POSITION

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MOTION TO DIRECT THE FEDERAL COMMUNICATIONS COMMISSION AND THE SOLICITOR GENERAL TO FILE A STATEMENT OF THEIR POSITION

Mid-Florida Television Corp., petitioner herein, respectfully moves this Court to issue an order directing the Federal Communications Commission and the Solicitor General to file a statement of their position on the pending Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia filed by Mid-Florida on June 1, 1965. In support whereof, the following is shown:

1. On June 1, 1965, Mid-Florida filed a Petition for a Writ of Certiorari requesting this Court to review a final judgment of the Court of Appeals for the District of Columbia Circuit entered on March 4, 1965. This decision remanded a final decision of the Federal Communications Commission to that agency for a new comparative television hearing on the application of Mid-Florida for a television station on Channel 9 in Orlando, Florida, and directed the Commission to accept and consider any other applications which might be filed for the facility. In its Petition for a Writ of Certiorari, Mid-Florida asserted that the Court of Appeals' decision should be reviewed by the Supreme Court because it involved an unprecedented and, in its view, unwarranted intrusion by the Court of Appeals into the administrative functions of the Federal Communications Commission. Mid-Florida asserted that the rationale of the Court of Appeals to require a new hearing and to accept new applications to be filed for Channel 9 in Orlando involved the exercise of administrative functions rather than judicial functions and that the Court had, in effect, usurped the role of the Federal Communications Commission in a matter committed to it by Congress.

2. The Federal Communications Commission filed a brief before the Court of Appeals supporting the decision of the Commission and urging that the grant of the license to Mid-Florida should be affirmed by that Court. However, neither the Federal Communications Commission nor the Solicitor General has filed a statement in support of, or opposition to, the Petition for a Writ of Certiorari of Mid-Florida. The questions which Mid-Florida has raised in the Petition For A Writ of Certiorari involve fundamental matters affect-

ing the relationship between the Court of Appeals for the District of Columbia Circuit and the Federal Communications Commission. These matters include the role of the Court of Appeals *vis-a-vis* the Commission and the distribution of power and responsibility between them. These are areas of sensitive public concern. Despite the patent importance of the case not only to Mid-Florida but to the agency involved, the Federal Communications Commission has not seen fit to appraise this Court of its position on the pending Petition for A Writ of Certiorari.

3. Mid-Florida urges the Court to direct the Federal Communications Commission and the Solicitor General to transmit a statement of their position on the pending Petition of Mid-Florida. Mid-Florida has raised serious questions intimately affecting that agency. The Court is entitled to be appraised of the views of the Federal Communications Commission before proceeding further in this matter.

Respectfully submitted

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Of Counsel

July 15, 1965.

I, Paul Dobin, do hereby certify that I have this 15th day of July, 1965 sent by first class United States mail, postage prepaid, a copy of the foregoing MOTION TO DIRECT THE FEDERAL COMMUNICATIONS COMMISSION AND THE SOLICITOR GENERAL TO FILE A STATEMENT OF THEIR POSITION to the following:

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